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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 71

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.

Appeal from the United States District Court for the District of Columbia

Reply to Memorandum for the United States by Appellee Pacific Motor Trucking Company

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Appeal from the United States District Court for the District of Columbia

Reply to Memorandum for the United States by Appellee Pacific Motor Trucking Company

This brief submitted by appellee Pacific Motor Trucking Company (herein referred to as PMT), is in reply to the Memorandum for the United States prepared by the Solicitor General, which was received by counsel for PMT on April 29, 1960. Inasmuch as the Government has rather surprisingly changed its position from the neutral position it adopted before the District Court (R. 67, 74), and inasmuch as the Government's Memorandum, though it supports appellants' position, was not filed within the time limits applicable to appellants' brief and was filed at or

after the filing of appellees' briefs, appellee PMT assumes that under Rule 41 of the rules of this Court it has the right to file this reply thereto up until the case is called for hearing.

ARGUMENT

I. The Solicitor General's Argument Amounts to the Contention That in the Absence of the Identical "Special Circumstances" or "Unusual Conditions" in the American Trucking Associations Case[1] the Commission Has No Power to Grant What the Solicitor General Describes as "Unrestricted Authority" in a Contract Carrier Permit to a Motor Carrier Subsidiary of a Railroad.

That the above is a fair statement of the Solicitor General's contentions is indicated by the following excerpts from his Memorandum:

(p. 4):

"* * * The special circumstances in that case [referring to the *American Trucking Associations* case] were that the 'other carriers frequently failed to handle such traffic, and gave service inferior to that of Motor Transit when they did operate' (p. 153) * * *.

In the present case, we find no such 'special circumstances' which justify the grant of the contract carriage authority. * * *

(p. 6):

"* * * The end result is that, within the wide geographic bounds prescribed, PMT, despite 'the absence of any showing of unusual conditions' (R. 31), has been awarded unrestricted authority to transport GM's cars and trucks. * * *

(p. 8):

"Unless there are 'special circumstances' which furnish compelling reasons for granting a permit for motor carriage to a railroad subsidiary, the policy of

1. *American Trucking Associations v. United States*, 355 U.S. 141 (1957).

> the Act, as set forth in the National Transportation Policy as well as Section 5(2)(b), is against any railroad-controlled motor carriage not connected with the railroad's own operations. This objective is not met by limiting a railroad subsidiary to part of the independent operating authority it seeks. The only circumstances advanced in the Commission's report to justify operations by PMT independent of the SP's rail operations—that the railroad previously carried the traffic and GM had stated it would not give it to the protestants—are not, we believe, the type of 'special circumstances' contemplated by this Court in *American Trucking Assns. v. United States, supra.*"

The above argument clearly can have no application to so much of the involved authority as was herein granted in the Sub 35 proceeding (authority to serve from Oakland, California, to Austin, Tonopah and Yerington, Nevada, points not on the lines of Southern Pacific Company). Thus, as pointed out at page 37 of our opening brief, "special circumstances" of the identical type involved in the *American Trucking Associations* case existed there, i.e., unavailability of adequate service by independent carriers.

Appellees, of course, strenuously contest the argument of appellants, in which the Solicitor General has now joined, that the Commission has here granted unrestricted authority as to the remainder of the operating permits granted. Our principal brief at pages 27-36 points out in great detail that the restriction of motor carrier service to points on the lines of the rail parent here imposed has always been regarded by the Commission and this Court as the basic "auxiliary and supplemental" restriction.

But for purposes of this brief appellee will assume arguendo the correctness of the Solicitor General's position that the Commission did grant PMT "unrestricted authority", and will further assume that the identical "spe-

cial circumstances" disclosed in the *American Trucking Associations* case did not exist. It will then be the purpose of this brief to show that the Commission's grant of such authority here was, nevertheless, within the Commission's power, because: (a) the Commission's right to grant unrestricted authority, as an exception to the usual rule, is not properly to be confined to a situation where the identical "special circumstances" of the *American Trucking Associations* case appear, either in the light of the decisions of the Commission or this Court dealing with common motor carriers, or the language and legislative history of the 1957 amendment to section 209(b), dealing with contract carrier permits, but, instead, exists whenever the Commission finds on the special facts of the particular case that following the exception will be in the public interest; and (b) in the present case the Commission found on other rationally supporting special facts that the grant of "unrestricted authority" was in the public interest.

II. The Commission's Power to Grant "Unrestricted Authority" Is Not to Be Confined to the Precise "Special Circumstances" of the American Trucking Associations Case but Exists Whenever the "Special Circumstances" of the Particular Case Justify It in the Public Interest.

In *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 49 M.C.C. 457, 473 (1946), the Commission expressed its views with respect to the granting of unrestricted motor common carrier authority to rail subsidiaries as follows:

> "It is our opinion, originally indicated in the *Kansas City Southern* case and confirmed by nearly a decade of experience in motor-carrier regulations, that the preservation of the inherent advantages of motor-carrier service and of healthy competition between railroads and motor carriers and the promotion of

economical and efficient transportation service by all modes of transportation and of sound conditions in the transportation and among the several carriers, in short the accomplishment of the purposes forming the national transportation policy, require that, except where unusual circumstances prevail, every grant to a railroad or to a railroad affiliate of authority to operate as a common carrier by motor vehicle or to acquire such authority by purchase or otherwise should be so conditioned as definitely to limit the future service by motor vehicle to that which is auxiliary to, or supplemental of, train service.

We appreciate, of course, that section 207, unlike section 5, does not require of a railroad, undertaking to prove that public convenience and necessity require a motor service which it proposes, any greater measure of proof than is required of any other applicant. But this does not mean that it is as easy for one applicant, as for another, to prove need for a proposed service or that this Commission considering an application by a railroad for authority to perform an all-motor service, not in aid of its rail service but in competition therewith and with other motor carriers, can ignore the circumstance that such applicant is a railroad whose operation as proposed would ordinarily be inconsistent with the principles underlying the national transportation policy. In other words, a railroad applicant for authority to operate as a common carrier by motor vehicle, though required to do no more than prove, as any other applicant, that its service is required by public convenience and necessity, has a special burden, not by reason of any attitude or action on our part, but by reason of the very circumstance that it is a railroad. *Where it fails to show special circumstances negativing any disadvantage to the public from this fact, a grant of authority to supply motor service other than service auxiliary to, or supplemental of, train service is not justified.*" (Emphasis added.)

This Court in reviewing that decision not only cited the last paragraph of the above quotation with apparent approval but went on to emphasize the Commission's broad and flexible power to grant certificates without all the usual restrictions, thus (*United States v. Rock Island Co.*, 340 U.S. 419, 428-429, 442 (1951)):

> "* * * Those divergences, however, are an exercise of the discretionary and supervisory power with which Congress has endowed the Commission. It is because Congress could not deal with the multitudinous and variable situations that arise that the Commission was given authority to adjust services within the limits of the Motor Carrier Act, § 208."

Again, in *Rock Island Motor Transit Co. Com. Car. Application*, 63 M.C.C. 91, 102, 108 (1954), the Commission reviewed its right to depart from its usual policy of imposing restrictions in occasional cases in these words:

> "The main purpose for the policy of imposing the five above-quoted restrictions, or modifications thereof, was to prevent the railroads from acquiring motor operations through affiliates and using them in such a manner as to unduly restrain competition of independently operated motor carriers. This policy was and is sound and should be relaxed only where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and (2) that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience." (p. 102)
>
> * * * * * * *
>
> "The findings hereinafter made are not to be construed as an abrogation of the policy established in *Kansas City S. Transport Co., Inc., Com. Car. Application, supra*. They represent an exception to that

policy justified by the evidence in this proceeding. In other words, such findings do not establish a precedent. *Each case of this character must be determined upon the facts and circumstances disclosed by the evidence.*" (Emphasis added.) (p. 108)

Finally, in *American Trucking Associations v. United States*, *supra*, 355 U.S. 141, 149-150, 152, in affirming the Commission's action in granting unrestricted authority in that case this Court approved the Commission's above language and declared further:

"In interpreting § 207, the Commission has accepted the policy of § 5(2)(b) as a guiding light, not as a rigid limitation. While it has applied auxiliary and supplementary restrictions in many § 207 proceedings, *the Commission has occasionally issued certificates to railroad subsidiaries without the restrictions where 'special circumstances' prevail, namely, where unrestricted operations by the rail-owned carrier are found on specific facts and circumstances to be in the public interest.* • • •

"We conclude, therefore, that the Congress did not intend the rigid requirement of § 5(2)(b) to be considered as a limitation on certificates issued under § 207." (pp. 149-150)

• • • • • • • •

"• • • But, for reasons we have stated, we do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a § 207 proceeding." (p. 152) (Emphasis added.)

From the above it is quite apparent that in common carrier rail subsidiary certificate cases, neither the Commission nor this Court has considered that the precise "special circumstances" (inadequacy of independent motor carrier

service) existing in the *American Trucking Associations* case were the only ones which could justify the grant of "unrestricted authority". It is further apparent that the real test is whether the special facts of a particular case justify the grant of unrestricted authority as in the public interest. A look at the language and legislative history of the August 22, 1957 amendment to section 209(b) of the Interstate Commerce Act in Public Law 85-163 (set forth in Appendix A, p. 8, to our Brief), is just as convincing that Congress also did not intend to confine the Commission to the precise "special circumstances" of the *American Trucking Associations* case in granting as in the public interest, exceptional "unrestricted authority" to rail motor carrier subsidiaries in contract carrier application cases.

The form of the bill, later adopted as Public Law 85-163, as originally introduced would have lent some support to the contention of the Government that the Commission in contract carrier cases could consider as a "special circumstance" only the element of adequacy of other carrier service. Thus, as pointed out at page 44 of our Brief, the bill as introduced would have amended section 209(b) of the Interstate Commerce Act so as to permit the Commission to grant a contract carrier permit only where it found, among other things, "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown". But, as indicated at pages 44-46 of our Brief, the contract carriers felt that this established too rigid a pattern, in which view the Commission and the Senate Committee concurred. Accordingly, the above language was eliminated by the Senate Committee and by Congress, and, as a substitute, section 209(b) was amended by adding the following new sentence:

> "In determining whether issuance of a permit will be consistent with the public interest and the national

transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

We think it is indeed significant that not only was the precise element of adequacy of other carriers' service eliminated as one of the criteria to be considered in determining whether a grant of a permit would be consistent with the public interest or the national transportation policy, but also the Commission was now enjoined to consider competing carriers only to the extent of taking into account "the effect which granting the permit would have upon the service of the protesting carriers". This, coupled with the facts that Congress refrained from prohibiting the grant of contract carrier permits to rail subsidiaries, and did not carry over the rigid section 5(2)(b) restriction applicable to them, would appear to be conclusive evidence that Congress did not intend any more rigid rule to be applied to them so far as granting exceptional unrestricted contract carrier permits was concerned than had theretofore been applied in connection with common carrier certificates.

This Court has twice adverted to the significance of the prior Commission practice in dealing with rail subsidiaries as a guide in determining the meaning of subsequently enacted amendments to the Interstate Commerce Act and as indicating congressional approval of that practice. *United States v. Rock Island Co., supra*, 432; *American Trucking Associations, Inc. v. United States, supra*, 150. The Commission's practice prior to the 1957 amendment in

the cases in which it had granted contract carrier authority to rail subsidiaries certainly belies the idea that Congress by that amendment intended to restrict the Commission to any precise "special circumstances" in determining to what extent a contract carrier permit to a rail subsidiary should be restricted. Thus, as pointed out at pages 46-47 of our Brief, the Commission in 1942 had granted contract carrier authority to a rail subsidiary of the Pennsylvania Railroad which was totally unrestricted and not even confined to rail points (*Scott Bros., Inc., Extension of Operations—Jersey City*, 34 M.C.C. 163 (1942)); at various times from 1943 to 1955 the Commission had granted similarly unrestricted authority to PMT to serve Nevada off-rail points and California off-rail points for export; and the entire Commission, in its first decision of May 8, 1957, in the present case had granted the authority to PMT to serve Oregon rail points on Southern Pacific Lines, otherwise unrestricted, and without finding the precise "special circumstances" of the *American Trucking Associations* case.

Finally, in the light of competitive conditions in the transportation industry prevailing in 1957 and undoubtedly known to Congress, it can be presumed that Congress had no intent to require the Commission to apply any more strict rules in determining whether and to what extent a rail subsidiary was to be granted a contract carrier permit than the Commission had prior thereto applied in common carrier and contract carrier applications by such subsidiaries. The well-recognized purpose behind the imposition of any restrictions in these cases is to prevent rail monopoly of motor carrier transportation. This threat no longer existed in 1957 in anywhere near the degree it may have existed in 1935 and 1940, in the days of the infancy of motor trucking, when Congress first enacted

the restrictive policy of section 5(2)(b) of the Interstate Commerce Act applicable to rail acquisitions of motor carriers. Thus, in 1957 the railroads carried a much smaller percentage of the total inter-city traffic than they did in those earlier years. This is plainly shown by the following comparison of the percentages of total intercity ton miles of traffic handled by rail and by truck for 1940 and 1957:

	Rail	Truck (public and private)
1940[2]	61.34%	7.91%
1957[3]	46.31%	19.29%

Cogent recognition of this transportation revolution is given in the following excerpt from the "Review of Federal Transportation Policy", A Report to the President Prepared by the Presidential Advisory Committee on Transport Policy and Organization (1955) (p. 1):

> "*Within the short span of one generation this country has witnessed a transportation revolution.*—All elements of the economy have been profoundly affected—investors in transportation property, geographic regions, distribution, individual shippers, the taxpayer, the ultimate consumers of goods and services. As late as 1920, the railroads held a virtual monopoly of intercity transportation with the exception of areas served by water. In striking contrast, there is available today a wide selection of transport methods for the movement of goods and people from one place to another with economy, expedition, and safety. The individual, whether traveling for recreation or business purposes, has a choice as between the private automobile, intercity bus transportation, air transportation, and railroad travel. The shipper, distributing finished products to a nationwide market, is free to elect the use of

2. 55th Annual Report of the Interstate Commerce Commission, p. 9.

3. 72nd Annual Report of the Interstate Commerce Commission, p. 10.

his own trucks, common or contract carriers by highway, a continental and physically integrated system of common carrier transportation by railroad, pipelines, coastal and intercoastal services, inland water transportation, or the rapidly developing air cargo services.

* * * * * * *

"* * * The net result is a competitive system of transportation that for all practical purposes has eliminated the monopoly element which characterized this segment of our economy some thirty years ago."

III. The Commission Found Adequate Special Facts Rationally Supporting Its Conclusion That the Grant of Authority to PMT, Even If It Be Considered Completely Unrestricted, Was in the Public Interest.

The Commission admittedly did not find the existence of the precise "special circumstances" or unusual conditions of the *American Trucking Associations* case. For this reason it imposed the auxiliary and supplemental restriction confining PMT service to points on the lines of its rail parent, Southern Pacific Company (R. 31). Nevertheless, we submit that even if this grant be considered, despite the above limitation, as completely unrestricted, the Commission found other special facts which rationally support, and therefore validate, its conclusion that such grant was in the public interest.

As appears from the quotations in the Commission's decisions in the two *Rock Island* cases, set forth above, the basic special facts which justify, as in the public interest, not imposing the usual auxiliary and supplementary restrictions are such as show that they are not needed in order to prevent undue restraint of competition of independently operated motor carriers. With this in mind it is plain that the special facts found in the present case

rationally support the Commission's grant of authority without the usual restrictions. Thus, the Commission found (R. 20):

"* * * Applicant has served General Motors as a contract carrier for a number of years[4] and a grant of the authority sought would enable it to furnish a needed enlarged service. Inasmuch as the considered traffic has been moving principally by rail, institution of the proposed service should have no adverse effect on existing motor carriers."

(R. 22):

"Applicant presently is providing General Motors with motor transportation in the movement of a substantial volume of traffic to intrastate points in California and to interstate points within the scope of its existing permits.

(R. 23):

"* * * It [General Motors] alleges that the existing common carriers are unable to offer the personalized and integrated service provided by applicant; that the services of the existing contract carriers are in some instances dedicated to service for its competitors; and that none of these carriers is as conveniently located for receiving its production as applicant. Should the requested authority be denied, General Motors indicates that it will either support the application of an independent motor contract carrier presently serving a branch plant at Arlington, Tex., identified as Texas Auto Transports, Inc., for similar authority, or institute proprietary operations.[5]

4. In the earlier decision the Commission found (R. 59) that the present situation has prevailed for many years, it having commenced its contract-carrier service for Chevrolet in 1935 in intrastate commerce.

5. The Commission, of course, has no power to force General Motors to use any particular carrier or to prevent it from engaging in proprietary trucking. Obviously there would be no more competitive injury to the independent truck appellees from having PMT perform this service than from having some other truck line or General Motors perform it.

(R. 26-27):

"* * * We deem it of controlling significance here that in the territory under consideration automobiles are commodities which can be economically and advantageously transported by rail to on-rail points, and that the nature of the movements from these three California plants is such as to render it unlikely that a significant amount of freight would be diverted from Southern Pacific to its motor contract carrier subsidiary if the proposed service were limited to Southern Pacific points. It does not appear that the amount of traffic likely to be diverted under these conditions would be large enough to afford either Southern Pacific or applicant an unfair competitive advantage over other carriers or to constitute a destructive competitive threat to other automobile producers.

(R. 27-28):

"* * * However, it is clear that all of the traffic except that moving on government bills of lading is now originated by Southern Pacific, and that regardless of whether the Sub 37 application is granted or denied, as concerns rail points of the Southern Pacific, there will be little or no diversion to the existing independent motor operators. In other words, a grant of authority to applicant to serve only those points which are stations on the lines of Southern Pacific should not result in any appreciable alteration of the existing competitive situation and should not unduly restrain competition or in any degree adversely affect the operations of other carriers."

CONCLUSION

For the foregoing reasons the argument of the Government is unsound and the decision of the lower court should be affirmed.

Respectfully submitted,

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Certificate of Service

I, ROBERT L. PIERCE, one of the attorneys for appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 9th day of May, 1960, I served copies of the foregoing brief on the several parties as follows:

1. On appellants, American Trucking Associations, Inc., its Contract Carrier Conference, National Automobile Transporters Association, Convoy Company, Robertson Truck-A-Ways, Inc., Hadley Auto Transport, B & H Truck-away, Western Auto Transports, Inc., and Kenosha Auto Transport Corp., by mailing copies, in duly addressed envelopes, with airmail postage prepaid, to Walter N. Bieneman, Esq., 2150 Guardian Bldg., Detroit 26, Michigan, to Larry A. Eskilsen, Esq., 1111 E Street, N.W., Washington 4, D. C., to Charles W. Singer, Esq., 1825 Jefferson Place, N.W., Washington, D. C., and to Peter T. Beardsley, Esq., 1424 Sixteenth Street, N.W., Washington, D. C.

2. On the United States, by mailing copies, in duly addressed envelopes, with airmail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C., and Willard R. Memler, Esq., Department of Justice, Washington 25, D. C.

3. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and James Y. Piper, Esq., Assistant General Counsel, at the offices of the Commission, Washington 25, D. C.

4. On General Motors Corporation, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Henry M. Hogan, Esq., 3044 West Grand Boulevard, Detroit 2, Michigan, to Walter R. Frizzell, Esq., 3044 West Grand Boulevard, Detroit 2, Michigan, to Beverley S. Simms, Esq., 612 Barr Building, Washington 6, D. C.

ROBERT L. PIERCE

SUPREME COURT OF THE UNITED STATES

No. 74.—October Term, 1959.

American Trucking Associations, Inc., et al., Appellants, *v.* United States of America, Interstate Commerce Commission, et al.	On Appeal From the United States District Court for the District of Columbia.

[June 27, 1960.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The principal question presented on this appeal is whether the appellee Interstate Commerce Commission properly declined to impose certain restrictions upon motor carrier permits it issued to a trucking company which is a subsidiary of a railroad.

The permits in question are designed to allow appellee Pacific Motor Trucking Company, a wholly owned subsidiary of Southern Pacific Company, to perform a particular type of transportation service for appellee General Motors Corporation. Prior to issuance of these permits, Pacific Motor already had been authorized to conduct certain trucking activities in a number of States into which Southern Pacific's extensive railway system penetrates. Without adverting to immaterial details, that authority may be described as follows: Pacific Motor held common carrier certificates from the Commission for the transportation of commodities, by way of service auxiliary to and supplemental of Southern Pacific rail service, over routes paralleling Southern Pacific lines in Oregon, California, Nevada, Arizona, New Mexico, and Texas. It also held contract carrier authority from the State of California for intrastate transportation of trucks and auto-

mobiles. Finally, it had been granted contract carrier permits by the Commission for the transportation of automobiles, trucks, and buses from certain points in California to three nonrail points in Nevada, to two points on the Mexican border, to certain points in Los Angeles Harbor, and to points in Nevada located on the Southern Pacific line. These latter contract carrier permits did not contain restrictions designed to make the service auxiliary to and supplemental of Southern Pacific rail service. Pacific Motor's only contract carrier shipper has been General Motors.

By the four applications which gave rise to the present controversy, Pacific Motor sought to extend the scope of its contract carrier service for General Motors. It requested authorization from the Commission for the transportation of new automotive equipment from plants of General Motors at Oakland, Raymer, and South Gate, California, to various interstate destinations not included within its prior permits. Generally speaking, the first application, designated *Sub 34*, covered contract carrier service from the Oakland plants to points on the Southern Pacific line in Oregon; the second, *Sub 35*, covered similar service to three Nevada nonrail points; the third, *Sub 36*, covered transportation from the Raymer plant to points in Arizona which are stations on the Southern Pacific line; and the last—and broadest—application, *Sub 37*, covered transportation from the Oakland, Raymer, and South Gate plants to points in seven States, whether or not on the Southern Pacific line.[1]

The Commission proceedings resulted in the grant of some, but not all, of the requested authority. On May 8,

[1] With respect to the transportation from Oakland and Raymer, the States were Washington, Oregon, Idaho, Nevada, Utah, Arizona, and New Mexico. The proposed transportation from South Gate was to be to the same States, excluding New Mexico but adding Montana.

1957, the Commission acted favorably on the *Sub 34* application. 71 M. C. C. 561. However, the Commission thereafter consolidated the four applications and heard oral argument. On September 9, 1958, the Commission issued its final report, 77 M. C. C. 605, which may be described specifically enough for our purposes as authorizing transportation by Pacific Motor to the three additional Nevada nonrail points and to points on the Southern Pacific line in Nevada, Utah, Arizona, Oregon, and New Mexico.[2] Otherwise, the applications were denied. There were certain other conditions imposed by the Commission, which we will detail later, but the major restriction was the limitation of points of destination to points on the Southern Pacific line.

Appellants—American Trucking Associations, Inc., its Contract Carrier Conference, the National Automobile Transporters Association, and six motor carriers—brought suit in Federal District Court to set aside the Commission's order. See 28 U. S. C. § 1336. Appellees Pacific Motor and General Motors intervened in support of the order. The United States was named a party defendant together with the Interstate Commerce Commission, but did not either participate in or oppose the defense. See 28 U. S. C. § 2323. A three-judge court, which was convened pursuant to 28 U. S. C. §§ 2325 and 2284, denied relief. 170 F. Supp. 38. Our appellate jurisdiction was invoked under 28 U. S. C. § 1253, and we noted probable jurisdiction. 361 U. S. 806. In this Court, the Commission opposes and the United States supports the appellants.

There is a preliminary challenge by Pacific Motor and General Motors to appellants' standing, a challenge which

[2] One Commissioner who concurred said that he would give broader authority; three Commissioners dissented from the grant; and of the three Commissioners who did not participate, one said that he would have joined the dissenters.

was sustained by two members of the lower court. We disagree with this holding. Since the basis for our view on the problem of standing will be more readily appreciated after the merits of the case have been fully treated, we postpone our discussion of this matter.

The critical issue raised by appellants is whether the Commission exceeded its statutory authority by granting the permits in question to a railroad subsidiary without imposing more stringent limitations than it did. On this question, the lower court unanimously ruled against appellants. This judgment must be evaluated in the light of this Court's previous decisions, set against the background of Commission practice.

Both the Commission and this Court have recognized that Congress has expressed a strong general policy against railroad invasion of the motor carrier field. This policy is evinced in a general way in the preamble to the 1940 amendments to the Interstate Commerce Act—the National Transportation Policy, 54 Stat. 899—which articulates the congressional purpose that the Act be "so administered as to recognize and preserve the inherent advantages" of "all modes of transportation." More particularly, Congress' attitude is reflected by a proviso to § 5 (2)(b) of the Act,[3] which enjoins the Commission to withhold approval of an acquisition by a railroad of a motor carrier "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

The Commission long ago concluded that the policy of the transportation legislation requires that the standards of § 5 (2)(b)—then § 213 (a) of the Motor Carrier

[3] 54 Stat. 906, as amended, 49 U. S. C. § 5 (2)(b).

Act of 1935, 49 Stat. 555—be followed as a general rule in other situations, notably in applications for common carrier certificates of convenience and necessity under § 207.[4] *Kansas City Southern Transport Co., Common Carrier Application*, 10 M. C. C. 221 (1938). And this Court has confirmed the correctness of the Commission's conception of its responsibilities under both § 5 (2)(b) and § 207. See *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419; *United States* v. *Texas & Pacific Motor Transport Co.*, 340 U. S. 450; *Interstate Commerce Comm'n* v. *Parker*, 326 U. S. 60. The Court has also taken cognizance of the congressional confirmation of the Commission's policy by the 1940 re-enactment in § 5 (2)(b) of the provisions of § 213 (a), after some of the pertinent Commission decisions had been specifically called to Congress' attention. See *United States* v. *Rock Island Motor Transit Co., supra*, at 432. And although the instant proceeding involves contract carrier applications and hence falls under § 209,[5] the Commission in its opinion recognized that, for purposes of the relevance of the § 5 (2)(b) standards, there is no distinction between this type of case and proceedings arising under § 207. 77 M. C. C. 621–622. Nor can we discern any grounds for differentiation.

Thus it is evident that the policy of opposition to railroad incursions into the field of motor carrier service has become firmly entrenched as a part of our transportation law. Moreover, this general policy fortunately has not been implemented merely by way of a more or less unguided suspicion of railroad subsidiaries, but rather has evolved through a series of Commission decisions from embryonic form into a set of reasonably firm, concrete

[4] 49 Stat. 551, 49 U. S. C. § 307.

[5] 49 Stat. 552, as amended, 49 U. S. C. § 309.

standards.[6] The Commission's opinion in the case at bar describes these standards as follows:

> "The restrictions usually imposed in common-carrier certificates issued to rail carriers or their affiliates in order to insure that the service rendered thereunder shall be no more than that which is auxiliary to or supplemental of train service are: (1) the service by motor vehicle to be performed by rail carrier or by a rail-controlled motor subsidiary should be limited to service which is auxiliary to or supplemental of rail service, (2) applicant shall not serve any point not a station on the railroad, (3) a key-point requirement or a requirement that shipments transported by motor shall be limited to those which

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[6] The first major Commission decision was rendered the year after the Motor Carrier Act of 1935. *Pennsylvania Truck Lines, Inc.—Barker Motor Freight, Inc.*, 1 M. C. C. 101. In refusing approval of an acquisition unless certain conditions were met, a division of the Commission stated:

". . . [W]e are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of section 213 . . . is evidence that Congress was not convinced that this should be done. Truck service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished by the partnership might flow from control by the railroad, but the question involved is broader than that and concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public." *Id.*, at 111–112.

The development of Commission policy is traced in detail in *Rock Island Motor Transit Co.—White Line Co.*, 40 M. C. C. 457. See also the similar and lengthy discussion in *United States* v. *Rock Island Co.*, *supra*, *passim*.

it receives from or delivers to the railroad under a through bill of lading at rail rates covering, in addition to the movement by applicant, a prior or subsequent movement by rail, (4) all contracts between the rail carrier and the motor carrier shall be reported to the Commission and shall be subject to revision if and as the Commission finds it to be necessary in order that such arrangements shall be fair and equitable to the parties, and (5) such further specific conditions as the Commission, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service. . . ."

The key phrase in this summary is obviously "auxiliary to or supplemental of train service." If a trucking service can fairly be so characterized, it is clear enough that there is compliance with the mandate of § 5 (2)(b) that the carrier should be able "to use service by motor vehicle to public advantage *in its operations.*" But if, on the other hand, the motor transportation is essentially unrelated to rail service, the railroad parent is invading the field of trucking, and, under normal circumstances, the National Transportation Policy is thereby offended.

It is this "auxiliary to or supplemental of" verbalization of the policy of § 5 (2)(b), as applied to § 207, that has found favor in this Court. See *American Trucking Assns.* v. *United States*, 355 U. S. 141; *United States* v. *Rock Island Motor Transit Co., supra; United States* v. *Texas & Pacific Motor Transport Co., supra; Interstate Commerce Comm'n* v. *Parker, supra.* Moreover, while the Court has not specified the more particularized restrictions which it might regard as essential constituents of the "auxiliary to or supplemental of" concept, it is significant that the Court in *Rock Island* apparently accepted the Commission's view that the phrase implies a limitation

of function, *i. e.*, type of trucking service, and not merely a geographical limitation, *i. e.*, place where the service is performed.[7] 340 U. S., at 436–444.

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[7] "The Commission asserts that the meaning of 'auxiliary and supplemental' . . . was not geographical . . . .

"What was in the Commission's mind as to the meaning of auxiliary and supplemental at the time it issued its certificate, we cannot be sure. At present a motor service is auxiliary and supplemental to rail service, in the Commission's view, when the railroad-affiliated motor carrier in a subordinate capacity aids the railroad in its rail operations by enabling the railroad to give better service or operate more cheaply rather than independently competing with other motor carriers. . . . The Commission has continually evidenced . . . its intention to have rail-owned motor carriers serve in auxiliary and supplemental capacity to the railroads. . . .

"The Commission has expressed its policy . . . by the phrase, perhaps too summary, auxiliary and supplemental. Though the phrase is difficult to define precisely, its general content is set out in *Texas & Pacific Motor Transport Co. Application*, 41 M. C. C. 721, 726 [establishing generally the same conditions set forth in the text, *supra*, p. —] . . . . While the practice of the Commission has varied in the conditions imposed, the purpose to have rail-connected motor carriers act in coordination with train service has not. . . ." 340 U. S., at 439, 442–443.

See the detailed discussion in *Rock Island Motor Transit Co.—White Line*, 40 M. C. C. 457. ("[T]here . . . appears to have developed a tendency in rail-motor acquisition proceedings to treat the *Barker* case restrictions as geographical or territorial only in their intent rather than as substantive limitations upon the character of the *service* which might be rendered by a railroad or its affiliate under any acquired right." *Id.*, at 470.) See also *Texas & Pacific Motor Transport Co. Application*, *supra*, at 726. ("Since petitioner's certificates limit the service to be performed to that which is auxiliary to or supplemental of the rail service of the railway, it is without authority to engage in operations unconnected with the rail service . . . . To the extent petitioner is performing or participating in all-motor movements on the bills of lading of a motor carrier and at all-motor rates, it is performing a motor service in competition with the rail service and the service of existing motor carriers; and,

But while the judicial and administrative current has run strongly in favor of auxiliary and supplemental restrictions on motor carrier subsidiaries of railroads, the Commission has determined, and this Court has agreed, that the public interest may sometimes be promoted by not imposing such limitations. A prime example is *American Trucking Assns.* v. *United States, supra*, where the trucking service was not being performed adequately by independent motor concerns. We there observed that the mandatory provisions of § 5 (2)(b) do not appear in § 207, and approved the Commission's policy of not attaching auxiliary and supplemental restrictions where "special circumstances" prevail. We concluded:

> "We repeat . . . that the underlying policy of § 5 (2)(b) must not be divorced from proceedings for new certificates under § 207. Indeed, the Commission must take 'cognizance' of the National Transportation Policy and apply the Act 'as a whole.' But . . . we do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a § 207 proceeding." 355 U. S., at 151–152.

These, then, are the guiding principles which have been established by what has gone before and which mark the range of our inquiry in this case. Since, as we have indicated, the Commission believes, and we agree, that there is no relevant difference between a § 207 proceeding and a § 209 proceeding so far as the problem here involved is concerned, the decisive questions are: (1) Did the Commission impose conditions upon the permits issued to

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to the extent it is substituting rail service for motor-vehicle service, the rail service is auxiliary to or supplemental of the motor-vehicle service rather than the motor-vehicle service being auxiliary to or supplemental of rail service.")

Pacific Motor under which the service to be rendered would be truly auxiliary to and supplemental of Southern Pacific's rail service? (2) If not, was the Commission's waiver of such restrictions justified by "special circumstances"?

The first question need not detain us long. The principal permits were qualified only by the following conditions: (1) the service was to be restricted to points which are stations on the Southern Pacific line; (2) "there may from time to time in the future be attached to the permits . . . such reasonable terms, conditions, and limitations as the public interest and national transportation policy may require"; and (3), Pacific Motor was to request the imposition of restrictions upon its outstanding certificates with respect to the transportation of automobiles and trucks.

The last restriction was designed to obviate any dual operation problem under § 210,[8] and is not pertinent to the auxiliary and supplemental standard. See 77 M. C. C., at 624. The second condition obviously is no restriction at all on present operations, and hence can hardly be said to limit the trucking to an auxiliary or supplemental service. We so recognized in *American Trucking Associations*, where the certificates contained a similar restriction. 355 U. S., at 154. And the first limitation, upon which appellees principally rely, is but a geographical, not a functional, restriction. As we have noted, *Rock Island* gives strong support to the view there expressed by the Commission that the essence of auxiliary and supplemental limitation is functional control. While it may be true, as appellees argue, that such a geographical limitation is a necessary ingredient of an auxiliary and supplemental restriction, it does not by any means follow that this ingredient makes the whole. Moreover, we have

[8] 49 Stat. 554, as amended, 49 U. S. C. § 310.

the strongest evidence that the Commission did not believe that it did, since the Commission specifically refrained from imposing the most general, but obviously the most significant, restriction—that "the service by motor vehicle . . . should be limited to service which is auxiliary to or supplemental of rail service." 77 M. C. C., at 623. The conclusion seems inescapable that the conditions imposed upon the permits to Pacific Motor, though undoubtedly "restrictions" in a general sense, were not limitations sufficient to hold Pacific Motor to a truly auxiliary and supplemental service.

Appellees urge that nonetheless there were "special circumstances" within the meaning of *American Trucking Associations*. Appellees point to various findings of fact by the Commission, such as the need of General Motors for a service of the type here involved, Pacific Motor's experience and qualifications, and the unlikelihood that a significant amount of traffic would be diverted from rail to motor transportation even if the permits were granted. The difficulty with appellees' argument is that the Commission did not find that considerations of this nature constituted "special circumstances" under the *American Trucking Associations* rule, but rather viewed them simply as supporting the basic determinations which it was required to make under § 209 (b) in order to issue a contract carrier permit to *any* applicant.[9] And naturally we

[9] Section 209 (b) provides in pertinent part:

"Subject to section 310 of this title, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Com-

should not substitute our judgment for the Commission's on a matter like this, for "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 87.

The Commission assigned but a single reason for not imposing the normal restrictions upon the Pacific Motor permits: to do so would compel Pacific Motor to conduct a common carrier service. Appellees support this decision upon the ground that the Commission is without authority under § 209 (b) to impose such character-destroying conditions upon a contract carrier permit.[10] We need not determine whether the Commission possesses the power to attach such limitations, or, in the alternative, to award a common carrier certificate, since we believe that, in any event, the Commission's reason is insufficient

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merce Act; otherwise such application shall be denied. *In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. . . .* (Emphasis added.)

The italicized portion was added by an amendment of August 22, 1957, 71 Stat. 411, well before the Commission's decision of September 9, 1958. Consequently, the Commission was required to apply the new standards. *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 78.

[10] Section 209 (b) provides in part that the Commission "shall attach to [the permit] . . . such reasonable terms, conditions, and limitations, *consistent with the character of the holder as a contract carrier* . . . as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out . . . the requirements established by the Commission under section 304 (a)(2) and (6) of this title . . . ."

justification for its action. Assuming that the restrictions which would limit Pacific Motor's operations to an auxiliary and supplemental service would also be incompatible with a contract carrier operation, and that the Commission was consequently powerless to impose those restrictions, this alone does not, in our view, meet the "special circumstances" test. There is, for example, no finding that independent contract carriers were unable or unwilling to perform the same type of service as Pacific Motor. In such a situation we do not believe that the policy of the Act allows the Commission to authorize service by Pacific Motor, limited only to points on the Southern Pacific line, simply because General Motors wants a contract carrier operation. If that desire of General Motors, in combination with the policy of the Act, disables a railroad subsidiary from obtaining the business, that is simply the result of the National Transportation Policy.[11] This consequence, we believe, does not meet the compelling public interest standard established by *American Transportation Associations*. A contrary conclusion would open the door to approval of over-the-road contract trucking by railroad subsidiaries to most, if not virtually all, major destinations, and hence would greatly attenuate the safeguards which have been painstakingly erected to prevent railroad domination of trucking. Appellees say that these safeguards are no longer needed, because independent trucking is no longer an "infant industry." This is an immaterial argument in this

[11] "Such restrictions hamper railroad companies in the use of their physical facilities—stations, terminals, warehouses—their personnel and their capital in the development of their transportation enterprises to encompass all or as much of motor transportation as the roads may desire. The announced transportation policy of Congress did not permit such development." *United States v. Rock Island Motor Transit Co.*, *supra*, at 443–444.

forum. We do not condemn the wisdom of the Commission's action. We simply say that the transportation legislation does, and that the pardoning power in this case belongs to Congress.

Thus the decision of the District Court must be reversed, because we conclude that the Commission fell into error of law. The question then arises whether there should be a remand which permits further proceedings. Appellants argue that there should not be, because the Commission, according to appellants, found that there were no special circumstances aside from the alleged impossibility of imposing the usual restrictions upon a contract carrier. It is true that the Commission based the rail-point restriction upon "the absence of any showing of unusual conditions." 77 M. C. C., at 623. But we cannot be certain that the Commission thereby intended to say that there were no special circumstances within the meaning of the *American Trucking Associations* principle. As we have pointed out, the rail-point restriction, standing alone, is different in kind from limitations which impose an auxiliary and supplemental service. Consequently, we cannot be sure that the Commission believes the same sort of circumstances determine the applicability of both types of restrictions. Moreover, the Commission's discussion of this point is open to the interpretation that it was repeating some of its conclusions with respect to the § 209 (b) standards, *e. g.*, "the effect which granting the permit would have upon the services of the protesting carriers." See note 9, *supra*.[12] Under these circumstances, we would be warranted in precluding further proceedings only if, by an independent search of the

[12] The rail-point limitation appears to have been designed primarily to prevent encroachment upon the business of competing rail carriers. Various railroads opposed the grant of authority before the Commission, but did not join in the federal court action.

record, we were able to conclude that, as a matter of law, there are no factors present which the Commission could have regarded as special circumstances. Although the findings of the Commission which are reflected in its opinion do not seem to us to comply with the *American Trucking Associations* standard, as the silence of the Commission seems to imply, we are unwilling in a complicated proceeding of this nature to deal with this problem *ab initio* or to say that the Commission could not have made additional findings on the basis of the evidence had it been aware that the ground its decision rested upon was insufficient. Consequently, under the particular circumstances of this case, we believe that it should be remanded to the Commission so that it can apply what we hold to be the applicable principles in such further proceedings as it may find to be consistent with this opinion.

The reversal and remand, however, will not include one aspect of the Commission's action—the grant of authority to provide a service to three nonrail points in Nevada—which is not governed by the rationale of our opinion. This small segment of the controversy has been submerged in the dispute over the much broader permit covering transportation to rail points in various States. It is obvious, of course, that "special circumstances" would have to be present to justify this Nevada award. Appellees maintain that there was such justification, and appellants have not established that it was lacking. Nor do we perceive any other reason to upset this award. Consequently, we affirm with respect to this particular permit.

There remains only the question of standing. Although the three-judge court concluded that the Commission had not exceeded its authority in this case, two members of the court also believed that "there was no showing of actual or anticipated direct injury such as would entitle

[the appellants] to institute this action." 170 F. Supp. at 48. In support of this conclusion, appellees rely principally upon *Atchison, T. & S. F. R. Co.* v. *United States*, 130 F. Supp. 76, aff'd *per curiam*, 350 U. S. 892. That decision held that certain railroads had no standing to challenge a Commission order authorizing acquisition by one motor carrier of others. Since the lower court in *Atchison* stressed the fact that the Commission there had not created any additional motor carrier service, the decision clearly is not in point. In the instant case, not only has the Commission created new operating rights, but they are rights in which appellants have a stake. And surely the statement by General Motors that it would not in any event give the business to any appellant cannot deprive appellants of standing. The interests of these independents cannot be placed in the hands of a shipper to do with as it sees fit through predictions as to whom its business will or will not go. The decision we believe to be controlling is not *Atchison*, but rather *Alton R. Co. v. United States*, 315 U. S. 15, where the Court confirmed the standing of a railroad to contest the award of a certificate to a competing trucker. We conclude, then, that appellants had standing to maintain their action to set aside the Commission's order under the "party in interest" criterion of § 205 (g) of the Interstate Commerce Act, 49 Stat. 550, 49 U. S. C. § 305 (g), and under the "person suffering legal wrong . . . or adversely affected or aggrieved" criterion of § 10 (a) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009 (a).

Our disposition of the case makes it unnecessary to consider the other issues raised by appellants.

We have no desire to hamper the Commission in the discharge of its heavy responsibilities, and we have always recognized that the Commission has been given a wide discretion by Congress. But that discretion has limits; our decision in favor of the Commission in *American*

Trucking Associations established the limits relevant to this case; and we conclude that those limits have been transgressed. Of course, in remanding the case we do not intend to circumscribe the Commission in determining whether appropriate "special circumstances" do exist in this instance which would take the case out of the otherwise conventional standards.

The judgment of the District Court is reversed and the case is remanded to that court with directions to remand to the Commission for such further proceedings, not inconsistent with this opinion, as may be appropriate.

It is so ordered.